

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

BOBBY C. CLIFFORD,)
Plaintiff,)
)
)
v.)
)
) Case No. 1:09-cv-01002-JDB-egb
THOMAS J. VILSACK,)
SECRETARY, UNITED STATES)
DEPARTMENT OF)
AGRICULTURE,)
)
Defendant.)

ORDER

Plaintiff has filed a Motion to Compel [D.E.12]. Defendant has responded [D.E. 16]. This matter has been referred to the Magistrate Judge for determination. Based upon the following, Plaintiff's motion is GRANTED IN PART and DENIED IN PART.

As an initial matter, the Plaintiff, acting pro se, has been ordered by the U.S. District Court, *inter alia*, to familiarize himself with the court's local rules, which include the requirements that prior to filing a motion relating to discovery he will (1) first consult with opposing party in a good faith effort to resolve the need for the motion and (2) submit a memorandum of law and a copy of a proposed order with the motion. Neither appears to have been done, although Defendant indicates that Plaintiff did mail a letter expressing his concerns with the Defendant's interrogatory responses. Plaintiff is reminded of the need to comply with all requirements of the local rules.

Plaintiff filed this case on January 5, 2009, alleging various claims against the Secretary of Agriculture, two of its agencies and several employees within the department. Plaintiff alleged that he was not considered for a position with the Natural Resources Conservation Service ("NRCS")

because of his age and that there was retaliation against him [D.E.1]. The District Court dismissed the claims pursuant to 42 U.S.C. §§ 1981, 1985 and 1988, and dismissed all claims against the U.S. Department of Agriculture, NRCS, and individual Defendants Lee, Brown, Bryant (no relation to this Magistrate Judge), Headden, West, Waltraph and Golf and two others named as parties on the face of the Complaint, Arland Landcaster and Dale Faugua. Plaintiff's remaining claims are based on Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 ("ADEA"). Plaintiff argues he was denied this position because he had filed a lawsuit against the NRCS, "around 1993." Further, he alleged that his not meeting the educational requirements of the job was so "remote" that it was a pretext for not hiring him.

This discovery dispute centers on Plaintiff's interrogatories 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, which seek information about applicants for any GS-457 Soil Conservation positions during the five years preceding Plaintiff's application for this position.

Defendant responds twofold: that the information sought is not relevant and that any information more than two years old has been destroyed per the NRCS' retention policy. The Declaration of Craig Cornwell, Assistant Regional Attorney, Office of Regional Counsel for the United States Department of Agriculture, confirms the retention policy of the NRCS as being two years [D.E.16-2]. However, case law provides an obligation to preserve evidence when a party has notice that the evidence is relevant to litigation or when they should have known that the evidence may be relevant to future litigation. See *Fujitsu Ltd. v. Federal Express Corp.* 247 F.3d 423, 436 2d Cir. (2001). Here, the earliest point in time this Court can determine that Defendant was aware it might face litigation is the date Plaintiff filed a complaint – February 27, 2006. Since Plaintiff's discovery seeks records for the five years preceding his October, 2005 application, these requests include the period of time from October 2000 to October 2005. Taking into account the retention policy, it would appear, at most, Plaintiff would have access to information from the NRCS records

for the period of February 27, 2004 (two years prior to the date Plaintiff's complaint was filed, and thus two years prior to the time Defendant was on notice to preserve evidence) to October, 2005 (date of Plaintiff's application).

This Court must determine whether the discovery Plaintiff seeks is relevant under Fed. R. Civ. P. 26 (b) (1). Prior instances of discrimination may be discoverable in instances where the discrimination sought is the same type of discrimination alleged. See *Busler v. Kmart Corp.*, 1999 U.S. Dist. LEXIS 16476, *23 (E.D. Tenn. Jan. 12, 1999). As one court in a similar context observed:

[E]vidence of other acts of discrimination or retaliation similar to the discrimination or retaliation charged have been admitted to show, for example, motive or intent. ... only discrimination or retaliation of the same character and type as that is alleged is probative. To establish that a prior discriminatory act is probative ... there is nothing in human experience which suggests that a person who is bigoted as to race is equally likely to refuse to accommodate a disabled person unless one wants to say that certain folks are "like that" and always act a certain way as to people who are different from them. But to say that is to draw the very inference the law never permits a finder of fact to draw ... Rule 404(a) would cease to be meaningful if any act of discrimination was admissible without a nexus to the type of discrimination charged.

White v. United States Catholic Conf., 1998 U.S. Dist. LEXIS 11832, *15-17 (D.D.C. May 26, 1998) (internal citations omitted).

Here, Plaintiff's claims are based on Title VII retaliation and the ADEA. Defendant asserts as defense that Plaintiff "was not referred to the selecting officials because he was deemed unqualified based on education" and further, that he "did not meet the requirement of three semester hours of soil studies." Defendant counters that his undergraduate work was done in quarters instead of semesters, that he had sufficient hours and that age discrimination and reprisal were at the heart of his non-selection.

Under the facts of this case, the Court believes there is a limited nexus and that Plaintiff is entitled to discovery of whether Defendant filled any GS-457 positions with individuals who lacked

this specific educational requirement, three semesters (or quarters equivalent) of soil studies. This disclosure is limited to the period of time from February 27, 2004 until October 31, 2005 as outlined above. The remainder of Plaintiff's motion is DENIED for lack of relevancy and non-availability of documents.

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: **July 16, 2010**

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.